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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 597

GUY FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

v.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on December 4, 1953. The decision of the court below sustained the ruling of the United States District Court for the District of Columbia that the Board's Notice and Order issued to eleven officers of respondent unions, requesting them to affirm the validity of their affidavits filed with the Board pursuant to Section 9(h) of the National Labor Relations Act, as

amended, was beyond the Board's statutory authority.

OPINIONS BELOW

The opinion of the court of appeals (R. 149-154) is not yet reported. The memorandum opinion of the district court (R. 48-52) is reported at 110 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1953 (R. 155). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board, when it has reason to doubt the authenticity of the non-Communist affidavits filed with it pursuant to Section 9(h) of the Act, may, in order to guard against fraudulent abuse of its processes, and to effectuate the basic objectives of that Section, administratively require the affiants to reaffirm the truth of their affidavits.

2. Whether, even if it be assumed or found that the Board lacks this authority under the Act, a federal district court has jurisdiction to review such administrative action.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 22-25.

STATEMENT

A. *The events giving rise to the suit*

Section 9(h) of the Act, in substance, disqualifies a labor organization from receiving statutory benefits under the Act unless each of its officers files annually with the Board an affidavit stating that he is not a member of or affiliated with the Communist party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the Government by force or by illegal or unconstitutional methods.[1] Pursuant to this provision, respondents' officers have annually filed such affidavits with the Board.[2] As a result, respondent unions admittedly have enjoyed, and continue to enjoy at the present time, substantial benefits under the Act.

In November 1952, a federal grand jury sitting in the District Court for the Southern District of New York issued a Presentment which was formally transmitted to the Board by Judge Edward Weinfeld of that court. The Presentment contained recitals to the effect that certain officers of respondent unions had refused to affirm before the grand jury the truth of the affidavits which they

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[1] The constitutionality of this provision of the Act was upheld by this Court in *American Communications Association* v. *Douds*, 339 U.S. 382.

[2] The officers of United Electrical Workers and of American Communications Association commenced filing such affidavits in 1949; the officers of Fur Workers, in 1950 (R. 8, 84, 96, 136).

had filed with the Board and upon which the compliance status of respondent unions depended (R. 30-33).[3] These facts, which respondents do not challenge, raised substantial doubt as to whether the affidavits in question were genuine and filed in good faith or were false and merely a stratagem or subterfuge, for the purpose of perpetrating a fraud upon the Board to abuse its processes and to subvert the Congressional mandate of denying the benefits of the Act to labor organizations whose officers were Communists or otherwise ineligible under Section 9(h).

Prompted by these recitals,[4] the Board, on December 19, 1952, issued a Notice and Order to eleven officers of respondent unions, advising each officer

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[3] On April 13, 1953, after the decision of the district court in the instant proceeding and while the appeal therefrom was pending, Judge Weinfeld granted an application to expunge the Presentment as unlawful. 111 F. Supp. 858 (S.D. N.Y.). This, however, does not obliterate the doubt created by the action of the officers before the grand jury, for, though the Presentment be beyond the jury's authority, the jury itself was duly constituted and the facts as to what occurred before it stand undisputed. In any event, no claim is, or ever has been, made that the authority for the Board's action derives from the Presentment (see n. 4, *infra*).

[4] The Board was, of course, also aware of the other matters of public record affecting respondent unions and the officers here involved. Thus, respondent unions were expelled from membership in the CIO following a hearing in which they were found to be Communist-dominated. Senate Document 89, 82nd Cong., 1st Sess.; Report of the Senate Sub-committee on Labor and Labor Management Relations, Senate Document 26, 83rd Cong., 1st Sess., pp. 1, 3, 23. Moreover, the Union officers here involved have on various occasions refused to answer questions of Congressional committees or of agencies of

that the "Board deems it necessary, in order to protect its own processes from abuse," and to enable it to determine whether respondent unions are "in fact in compliance with the filing requirements of Section 9(h) of the National Labor Relations Act, as amended, to be assured of the truth and validity of the non-Communist affidavits you have previously filed with the Board" (R. 22, 73, 114). Each Notice and Order embodied a questionnaire which required the union officer concerned to affirm the truth of all the non-Communist affidavits which he had previously filed with the Board, and also to state whether, at any time since filing his initial affidavit with the Board, he had been a member of or affiliated with the Communist Party or any of the other organizations interdicted by Section 9(h) (R. 24, 74, 116).[5]

Government concerning their alleged membership or affiliation with the Communist Party or Communist-dominated organizations, or concerning the validity of their affidavits filed pursuant to Section 9(h) of the Act. See Report of Senate Subcommittee, *supra*, pp. 7, 9-10; Hearings Before the House Committee on Un-American Activities, Communist Activities in the Pittsburgh Area, 82nd Cong., 2nd Sess., pp. 854-858; Hearings Before the Senate Subcommittee to Investigate the Administration of the Internal Security Act, etc., 82nd Cong., 1st Sess., pp. 135-225, *passim*.

[5] The Notice and Order advised the officers that failure to answer the questionnaire would result in a "declaration by the Board that the [union] is not in compliance with the filing requirements of Section 9(h)" (R. 23). The Board, however, has made plain that it would not revoke the compliance status of any union pursuant to this Notice and Order without first affording the affected union an opportunity to be heard (R. 151).

B. *The proceedings below*

On December 31, 1952, the three unions here involved brought the instant actions in the United States District Court for the District of Columbia, praying for a declaratory judgment that the Board's Notice and Order was illegal and asking for an injunction restraining the Board from proceeding therewith (R. 4, 65, 106). The Board moved to dismiss the actions on the ground that the district court lacked jurisdiction in the premises and on the further ground that the unions stated no claims warranting relief (R. 47, 94, 134). The actions were consolidated for hearing and the district court on January 27, 1953, issued a single memorandum opinion covering the three cases (R. 48; 110 F. Supp. 220). In its opinion the district court, without specifically addressing itself to the jurisdictional issue, held that the Board's action was outside the scope of its statutory authority (R. 50, 51). Accordingly, the district court entered appropriate orders denying the Board's motions to dismiss and granting the unions' motions for injunctive relief (R. 56, 99, 139).

On appeal, the court below (R. 149-154) agreed with the district court that the Board's function with respect to non-Communist affidavits was "administrative only," and that there was nothing in the Act or in its legislative history indicating that Congress intended to authorize the Board to conduct an inquiry as to the truth or falsity of the affidavits. That function, in the court's view, was

reserved exclusively to the Department of Justice. Continuing, the court's opinion states (R. 153):

> We hold, for the reasons expressed in the trial court's memorandum, that the Board has no authority under the Act to deprive the unions of their compliance status under § 9(h). The scheme of § 9(h) is clear. It imposes a criminal penalty for filing a false affidavit under § 9(h), in order to deter Communist officers from filing at all; then the failure of such an officer to file is made the touchstone for barring his union from crucial benefits under the Act, as an incentive to the membership to rid itself of such leadership. There is nothing in the Act or in its legislative history or in good sense to indicate that Congress meant to go further and impose the drastic penalty of excluding the union from the Act's benefits because the officer had deceived the union as well as the Board by filing a false affidavit. We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit. The Board makes no claim of such awareness here. To impose this penalty upon the great mass of union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets.

The court below further held that the district court had jurisdiction of the subject matter. In its view, the scheme of the Act, providing solely for review by the Courts of Appeals of final action by

the Board in unfair labor practice cases, did not preclude the exercise by a district court of its equity power to restrain the Board from taking preliminary action which, as here, was "plainly beyond the scope of [its] statutory authority" and which resulted in "real, immediate, and incalculable injury" (R. 153-154). Accordingly, the court below affirmed the decision of the district court (R. 154).[6]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, in instances where grave doubt has arisen as to the *bona fides* of affidavits filed by union officers pursuant to Section 9(h), the Board is without power under the Act to take administrative action to assure itself that both the objective of Section 9(h) and the integrity of its processes have not been abused by the grant of benefits to unions which in fact have not rid themselves of Communist officers.

2. In holding that the Board was without power to issue its Notice and Order in the instant cases.

3. In holding that under Section 9(h) a criminal penalty for the officer is the sole consequence of a false affidavit, and that such falsity, at least absent a showing that the union membership had pre-

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[6] Judges Prettyman and Bazelon participated in this decision; Judge Proctor, the third member of the panel, died before consideration and decision of the matter. On the same day the decision herein issued, another panel of the same court, consisting of Judges Miller, Bazelon, and Washington, cited it in denying a stay of the temporary injunction involved in No. 598, (discussed, p. 10, *infra*).

viously been aware thereof, does not empower the Board to cancel his union's compliance status.

4. In holding that the district court had jurisdiction of the subject matter of the actions.

5. In failing to reverse the decision of the district court.

REASONS FOR GRANTING THE WRIT

1. Section 9(h) of the Act represents, as this Court has stated, "the congressional purpose . . . to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party. . . .'" *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325. To achieve that purpose Congress barred access to the Board's processes to unions whose officers failed to file the non-Communist affidavits prescribed by that Section. If the court below is correct in its conclusion that the Board's function under Section 9(h) is purely ministerial and that the Board is powerless to conduct an administrative inquiry as to the truth or falsity of the affidavits, then the tool which Congress fashioned to eradicate Communist influences from the American labor movement is indeed a feeble instrument. For, if the Board must accept such affidavits at face value, despite the fact that their truth or validity has been put in doubt, the result is that Communist union leaders, through the mere expedient of filing a false affidavit, may flout not only the objectives of Section 9(h) but also abuse the integrity of the Board's process—a result

which we believe to be at war with the basic Congressional purpose.

Moreover, the decision below transcends the propriety of the inquiry here. Its broad ground—that a false § 9(h) affidavit results merely in a criminal penalty for a guilty union officer and does not deprive his union (at least absent the membership's knowledge of the fraud) of the Act's benefits—also affects other litigation in the District of Columbia Circuit challenging the legality of additional aspects of the Board's administration of Section 9(h).

Thus, believing that this would best effectuate the policies of the Act, the Board, on October 23, 1953, announced that when an indictment has been returned against a union officer for falsifying his § 9(h) affidavit it would, pending the outcome of the criminal case, defer the final processing of any further representation cases involving his union (18 F.R. 7185). On November 23, 1953, the same district court which issued the injunction herein found that this policy too was beyond the Board's statutory authority and preliminarily enjoined its continued application. *International Fur & Leather Workers* v. *Farmer,* No. 5133-53 (D. D.C.). The Board thereupon took an appeal from this injunction to the court below, and requested it to stay the decree pending disposition of the appeal. The same day that it issued its decision in the instant case, the court below denied this stay, citing as authority the decision herein. (Record in No. 598, pp. 42-46, 51.)

Accordingly, in the view of the court below, the principles enunciated in the instant decision control, not only the legality of the questionnaires here, but also that of the Board's indictment policy. The Board is, therefore, filing along with the instant petition for certiorari a like petition to review the injunction entered against the Board's indictment policy (*Guy Farmer, et al.* v. *International Fur & Leather Workers,* No. 598).

It is patent that the question decided by the court below is, in the light of the Congressional objective, of major importance in the administration of the Act. Furthermore, since, as we view it, the decision below substantially thwarts the Congressional purpose of removing Communist influence from the American labor movement, it is desirable that Congress know the limits of the Board's power under Section 9(h) in order to determine whether additional legislation is necessary to reach the evil which Congress has sought to eradicate. Hence, we submit, the decision below clearly warrants review by this court.

2. In nullifying the questionnaires here, the court below has held that the Board, upon learning that its processes may have been invoked by fraudulent § 9(h) affidavits, cannot conduct an administrative inquiry to determine whether this is in fact so, but must accept the affidavits at their face value. This conclusion rests on the assumption that, by imposing "a criminal penalty for filing a false affidavit under § 9(h)" (R. 153), Congress intended to make the veracity of the affidavit wholly irrelevant to the

Board's function. Contrary to the court's view, we think there "is nothing in the Act or in its legislative history or in good sense" (R. 153) that warrants such an assumption which leaves the Board powerless to protect its processes against palpable abuse, and frustrates Congress' basic objective in enacting Section 9(h) which was not merely to punish falsehood but primarily to withhold the benefits of the Act from unions with Communist leaders.[7]

This Court recognized long ago that the Board is endowed with implied power to protect its processes from abuse, and, accordingly, to make appropriate inquiries toward that end.[8] It also seems clear that such abuse may be found when Board facilities have been invoked "for the purpose of effectuating the objects and designs of the Communist Party rather than to enforce . . . rights . . . under the Act." *National Labor Relations Board* v. *Fulton Bag & Cotton Mills,* 180 F. 2d 68, 71 (C.A. 10). Acquiring access to Board processes by means of a false and fraudulent § 9(h) affidavit constitutes an abuse of these processes no less than the filing of a fraudulent unfair labor practice charge. Hence, it is the Government's contention that, even apart from the specific implied authority

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[7] See *American Communications Association* v. *Douds,* 339 U.S. 382, 387-388, 393. *National Labor Relations Board* v. *Highland Park Manufacturing Co.,* 341 U.S. 322, 325.

[8] *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U.S. 9, 18-19; *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U.S. 219, 235. See also, *National Labor Relations Board* v. *Weissman Co.,* 170 F. 2d 952, 954-955 (C.A. 6), certiorari denied, 336 U.S. 972.

emanating from Section 9(h) itself, the Board's general and necessary power to safeguard the integrity of its processes furnishes ample basis for a Board inquiry into the genuineness of affidavits clouded by doubt.

Section 9(h), far from negating the Board's authority to make such inquiry, confirms it. Thus, the terms of Section 9(h) impose a continuing duty on the Board to withhold its processes from noncomplying labor organizations. Section 9(h) requires each officer to renew his affidavit on file with the Board every 12 months, and, because "of the fluid and elective nature of the official personnel of labor unions" (*National Labor Relations Board* v. *Dant,* 344 U.S. 375, 383), new affidavits may even have to be filed at shorter intervals. Since in representation cases, for example, the Section further requires that the appropriate affidavits be on file at each stage of the investigation, the Board must keep constantly alert to expiration dates of affidavits already filed and to changes in union officials, and is required, when it finds that the affidavits no longer meet the requirements of Section 9(h), to halt pending cases.[9] Moreover, even after it has issued a certification or a bargaining order, the Board is authorized to nullify such benefit should its subsequent administrative investigation reveal that the union involved had not been in full compliance with Section 9(h) because certain of its

[9] See *Rite-Form Corset Co.*, 75 NLRB 174, 175; National Labor Relations Board, Fifteenth Annual Report (Gov't Print. Off., 1950), 26-27. Cf. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322.

officials, who were in fact officers within the meaning of the Section, had failed to file affidavits.[10] It is hardly likely that Congress—although allowing the Board to investigate the sufficiency of compliance in these respects, and, indeed, to declare a union out of compliance merely because an officer's affidavit has expired or the complement of officers has changed [11]—nevertheless precluded the Board, where it has grounds for doubt, from inquiring whether the affidavit itself is genuine or a sham.

Permitting the Board this power of inquiry does not, as the court below assumed, intrude upon the function which Section 9(h) assigns to the Department of Justice, nor conflict with the legislative history of the provision. This history shows that the version of Section 9(h) which was originally passed by both houses of Congress forbade the granting of benefits under the Act to any labor union if its officers were members of the Communist Party or held other proscribed membership, affiliation, or belief.[12] Under that version, the Board, *prior* to conferring benefits under the Act,

[10] National Labor Relations Board, *Rules and Regulations*, Series 6, as amended, Sec. 102.13; *Sunbeam Corp.*, 94 NLRB 844, 96 NLRB 1029; *Compliance Status of Furniture Workers, Upholsterers and Woodworkers Union, Local 576, Independent*, Order issued January 14, 1954, involving, *inter alia*, Case No. 21-RC-2661; *Chicago Rawhide Manufacturing Co. and International Fur and Leather Workers Union*, Notice to Show Cause issued in Case No. 13-CA-847, October 20, 1953; *Square D Co.*, Supplemental Decision in Case Nos. 21-CA-956, 1106, November 24, 1953, 33 LRRM 1088.

[11] A "matter of happenstance" which often affects "unions which do have leadership willing to comply." *Dant* case, *supra*, at 383-384.

[12] 1 Legislative History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948), 190, 251.

would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics (93 Cong. Rec. 6375, 6381). This was changed in conference—to the present requirement that officers file disclaiming affidavits, which, like other statements made to the Government, would be subject to Section 35A of the Criminal Code—solely for the reason "that representation proceedings might be indefinitely delayed if the Board *was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation [emphasis supplied]."[13]

Hence, Congress, in order to avoid delays in Board proceedings, made it clear that the Board was not required to permit private parties to such proceedings to litigate the alleged Communist character of the union involved. *National Labor Relations Board* v. *Sharples Chemicals, Inc.* (C. A. 6), decided January 27, 1954, 33 LRRM 2438; *National Labor Relations Board* v. *Louisville Container Corp.* (C.A. 6), decided January 27, 1954, 33 LRRM 2446. It decided instead that the filing of disclaiming affidavits would be sufficient to open Board processes. But it does not follow therefrom that Congress precluded the Board from "set[ting] up administrative procedure to satisfy itself that a . . . union has complied." *National Labor Relations Board* v. *Sharples Chemicals, Inc., supra,* 33 LRRM at 2442. Nor does it follow that Congress intended this initial acceptance of affidavits to pre-

[13] 93 Cong. Rec. 6444 (Senator Taft). See also, *id.*, at 6447, 6860; 1 Leg. Hist., 553.

clude the Board itself, upon subsequently having reason to believe that they may be fraudulent, from conducting its own inquiry into their genuineness. In these circumstances, as the court below recognized (R. 153), the Board investigation is "preliminary" to any particular proceeding, and thus does not entail the type of delay and interruption which concerned Congress. By the same token, it is also clear that such Board investigation, unlike that of the Department of Justice, does not undertake to impose a penalty for falsehood, but merely to insure that the condition for access to Board facilities imposed by the statute has in fact been met.[14] Finally, to read the legislative history as precluding all Board inquiry into the validity of the disclaiming affidavits ignores the basic Congressional purpose underlying the legislative history, i.e., the desire to deny the benefits of the Act to Communist-led unions; it makes the mere filing of affidavits, a requirement inserted solely as a means for effecting that goal, the ultimate end of Section 9(h). It attaches conclusive significance, so far as Board proceedings are concerned, to form rather than substance. The mere filing of formal affidavits is made the ultimate touchstone regardless of how false and fraudulent they may be.

On no firmer footing is the lower court's premise that a Board inquiry into the validity of the affidavit is barred because Congress could not have intended that the union officer's fraud should result in a retroactive "penalty upon the great mass

[14] Cf. *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398.

of innocent union members" (R. 153). Throughout the Congressional debates on Section 9(h), opponents thereof repeatedly pointed out that the very nature of the limitation was such that the "real sufferers" would be "all the union members —whether they are anti-Communist, non-Communist, or Communist."[15] Nevertheless, the majority of Congress—concluding that the danger of "political strikes" from Communist union officers was as great where the rank-and-file were unsuspecting dupes as where they were conscious followers—deliberately rejected this consideration, conditioning the union's right to access to the Board on the objective determination whether it had rid itself of Communist leaders,[16] and without reference to the extent to which individual union members were thereby denied benefits or the extent to which individual members were guilty or innocent of responsibility for the continuance in office of the Communist leadership.

Furthermore, there is no reason why, under the scheme of the Act, the position of union members who are deceived by their officers should be any better than that of members who are misled by Board action. In the latter situation, as this Court's decision in *Highland Park,* 341 U. S. 322, illustrates, the union—through no fault of its mem-

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[15] 93 Cong. Rec. 6497 (Senator Murray). See also, *id.* at 6385 (Representative Madden); 6455 (Senator Morse); 6505 (Senator Murray).

[16] Cf. *N. Y. Central R. R. Co.* v. *United States,* 212 U.S. 481, 492, 496; *State of Indiana* v. *Ewing,* 99 F. Supp. 734, 736 (D. D.C.), dismissed on other grounds, 195 F. 2d 556 (C.A. D.C.).

bers nor, indeed, of its officers—retroactively loses statutory benefits.[17] So here, the mere fact that such consequence would result if the Board were empowered to declare a union out of compliance upon discovering an officer's fraud does not, contrary to the court below, negate the existence of such power. Congress has, in effect, provided that a union cannot avail itself of the benefits of the Act, regardless of its members' individual beliefs or culpability, unless and until the union is cleansed of Communist leadership. Section 9(h), as was its purpose, creates a substantial incentive for the membership to take such action.

3. The question raised by the procedural holding of the court below—i.e., to what extent the Act's specific provision for direct review in the appropriate Court of Appeals (Sections 10(e) and (f)) ousts the district courts of jurisdiction over Board administrative action—has twice been specifically reserved by this Court. *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401, 412; *Inland Empire District Council* v. *Millis,* 325 U.S. 697, 700. That question, as this Court has declared, "can be appropriately answered" only in a situation where there is "some showing that the Board has acted unlawfully." *Ibid.*

Assuming the illegality of the instant Board action, this case (as well as the companion case, No.

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[17] See also, *National Labor Relations Board* v. *J. I. Case Co.*, 189 F. 2d 599 (C.A. 8); *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731, 733 (C.A. 1). Alleviation of this result required a specific amendment to the Act. Act of October 22, 1951, 65 Stat. 601.

598) would satisfy this requirement, and thus render the previously deferred jurisdictional issue ripe for adjudication. Moreover, a definitive ruling thereon by this Court is particularly appropriate here because the result reached by the court below is in conflict with the principle consistently applied by other Courts of Appeals.

Thus, the courts, both under the original and amended Acts, have uniformly concluded that the scheme of the Act and its legislative history [18] make clear Congress' intention to permit judicial review of Board action only when it has manifested itself in a form which would subject it to review in the Court of Appeals under Sections 10(e) or (f). Following the rule of *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 301—viz., that "constitutional questions aside, it is for Congress to determine how the rights it creates shall be enforced"—these courts have held that, unless the Board action raises a substantial constitutional question, review thereof may not be obtained in a federal district court, even though it is alleged that the Board has acted unlawfully or beyond its statutory authority. *Madden* v. *Brotherhood,* 147 F. 2d 439 (C.A. 4); *Fitzgerald* v. *Douds,* 167 F. 2d 714 (C.A. 2); *Fay* v. *Douds,* 172 F. 2d 720 (C.A. 2); *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers Local No. 2,* 173 F. 2d 557 (C.A. 8). See also, *White* v. *Herzog,* 80 F. Supp. 407 (D. D.C.);

[18] See 1 Leg. Hist., *op. cit.,* 334, 560-561; 93 Cong. Rec. 6444; *Madden* v. *Brotherhood,* 147 F. 2d 439, 443-444 (C.A. 4).

Housewright v. Hull, 104 F. Supp. 234 (N.D. Ohio); *M.E.S.A.* v. *Schauffler,* 103 F. Supp. 130 (E. D. Pa.).[19]

As these cases reveal, this principle has precluded district court review even where the Board action has reached the point of a certification, the final act in a representation proceeding under Section 9. *A fortiori,* it bars such review where, as here, the action is wholly "preliminary" (R. 153) to either a representation or an unfair labor practice proceeding. See *Hourihan* v. *National Labor Relations Board,* 201 F. 2d 187 (C. A. D. C.), certiorari denied, 345 U. S. 930; *Lincourt* v. *National Labor Relations Board,* 170 F. 2d 306 (C. A. 1); *General Drivers* v. *National Labor Relations Board,* 179 F. 2d 492 (C. A. 10).

The holding of the court below, on the other hand, would permit district court review of Board action which is both "preliminary" and presents no substantial constitutional question.[20] Hence, contrary

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[19] The enactment of the Administrative Procedure Act (5 U.S.C., 1001 *et seq.*) neither overruled the *Switchmen's* case nor impaired its relevance to the problem of extra-statutory review under the National Labor Relations Act. See *Kirkland* v. *Atlantic Coast Line,* 167 F. 2d 529 (C.A. D.C.), certiorari denied, 335 U.S. 843; *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers, Local No. 2,* 173 F. 2d 557, 559 (C.A. 8); *Fay* v. *Douds,* 78 F. Supp. 703, 705 (S.D. N.Y.), affirmed, 172 F. 2d 720 (C.A. 2); Attorney General's Manual on the Administrative Procedure Act (U.S. Dept. of Justice, 1947) 94-95. Cf. *Heikkila* v. *Barber,* 345 U.S. 229.

[20] Although the complaints herein (R. 13-14, 68, 109) alleged that the Board's action was unconstitutional in several respects, the court below made no attempt to evaluate the substantiality of these contentions. Having decided that the Board action was unlawful, it proceeded to decide the juris-

to the decisions cited above and the expressed intention of Congress, it would enlarge the supervisory power of the federal district courts over the administration of the Act, permitting them to scrutinize Board action which not only involves no legal issues of constitutional stature, but is, as yet, unrelated to any particular proceeding. This conflict is of sufficient magnitude to warrant resolution by this Court, for it affects not only judicial review of Board action involving Section 9(h) but also of Board action on other subjects.

CONCLUSION

The issues presented are of large importance in the administration of the Act. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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February, 1954.

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dictional question, thereby assuming that the circumstance of illegality alone was sufficient to confer power on the district court (R. 153-154). In any event, it seems apparent that there is no substance to the constitutional contentions raised in the complaint. See *Query* v. *United States*, 316 U.S. 486, 488; *Ex parte Buder*, 271 U.S. 461, 466-467; *United States* v. *White*, 322 U.S. 694, 698-699; *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 710.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

REPRESENTATIVES AND ELECTIONS

Sec. 9. * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor

organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the

District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the

unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 597

GUY FARMER, CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.,

Petitioners,

v.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), ET AL.

On Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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On Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the District of Columbia (J. A. 149-154) is not yet reported. The opinion of the United States District Court for the District of Columbia is reported at 110 F. Supp. 220.

Jurisdiction

The judgment of the Court of Appeals was entered on the 4th day of December, 1953. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether the two lower courts erred in holding that the petitioner has no power to deprive the respondent unions of their compliance status where these unions have met the statutory requirements of Section 9(h) of the Act by duly filing non-Communist affidavits, in light of clear statutory language and legislative history that the Board has no statutory power to inquire into the truth or falsity of these affidavits.

2. Whether the two lower courts erred in holding that a federal district court had jurisdiction to restrain the action of the petitioner beyond its statutory power described in question one, in light of the finding of real, immediate and irreparable injury.

Statutes Involved

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C. Supp. V 151 et seq.) are set forth in the Appendix to the petition for writ of certiorari herein.

Statement

(a) Respondents' Compliance with the Act

Since 1949 the respondents United Electrical, Radio and Machine Workers of America (UE) and American Communications Association (ACA) and since 1950 the International Fur and Leather Workers Union of the United States and Canada (IFLWU) have regularly filed with the National Labor Relations Board the data required by Sections 9(f) and 9(g) of the National Labor Relations Act and

their respective officers have regularly submitted to that agency the affidavits required by Section 9(h).[1]

The Board has annually acknowledged receipt of such affidavits and has recognized the compliance status of respondents for the forthcoming year. On October 30, 1952, the Board in a communication to UE stated that it would "consider the organization in compliance * * * under Section 9(h) until September 8, 1953 * * * " (J. A. 20). Similar communications were sent to ACA, recognizing its compliance until June 10, 1953 (J. A. 72) and to IFLWU, recognizing its compliance until June 18, 1953 (J. A. 112-113).[2]

(b) The Grand Jury Presentment

On November 25, 1952, a federal grand jury in the Southern District of New York issued a "presentment" to the effect that certain officers of respondent unions, while they had affirmed that they had signed the section 9(h) affidavits which they had filed with the Board, had exercised their privilege under the Fifth Amendment before said grand jury with respect to the truth of such affidavits (UE Complaint, Ex. 7, J. A. 30-33). The grand jury returned no indictments but recommended that the Board (1) withdraw the certifications of the unions concerned because of the assertion of the privilege by some of the officers, and (2) consider "the inclusion in each affidavit of a waiver by the affiant of his Fifth Amendment privilege with reference to any question pertaining to the truth of his statements in the affidavits" (J. A. 32).

In an ex parte proceeding, and at the request of the grand jury, the District Judge in New York to whom the

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[1] Hereafter the National Labor Relations Act will be designated as the Act and the National Labor Relations Board will be designated as the Board.

[2] The Board has similarly recognized the current compliance of the respondents upon their timely filing of the non-communist affidavits in 1953.

presentment was handed up forwarded it to the Board, and later, at the request of the United States Attorney, entered an order forwarding the names of the witnesses referred to the Board.

On application of UE and ACA the district court on April 23, 1953 ordered that the presentment be expunged and held that the grand jury had usurped executive and legislative authority and had violated the oath of secrecy of grand-jurors and the rules of secrecy proscribed by Rule 6(e) of the Federal Rules of Criminal Procedure. The District Judge, noting that the grand jury had returned no indictments, characterized the presentment as a "foul blow" and akin to a "hit and run driver". *Application of United Electrical, Radio and Machine Workers of America, et al.*, 111 F. Supp. 858.

(c) The Order of the Board

In the meantime, however, and while the appplication to expunge the presentment was *sub judice* in New York, the Board, on the basis of said presentment, made its Order on December 19, 1952. The Order was issued ex parte. It ran to respondent unions and to eleven of their officers and directed that each officer (1) reaffirm each of the section 9(h) affidavits he had ever filed with the Board, and (2) state whether he had at any time since the filing of the first such affidavit been a member of the Communist Party or affiliate therewith, or been a member of any other proscribed organization. The Order provided that "the failure to file a timely answer (by a specified date) to each of these questions will result in a finding by the Board that there is reasonable doubt as to the truth and validity of your affidavit, and therefore in a declaration by the Board that [the respective organization] is not in compliance with the filing requirements of Section 9(h) * * * " (J. A. 23, 77, 116).

The only basis of the Order recited therein, is the aforesaid void presentment, and the Board conceded at the hearing below that except for such presentment, it had no rea-

son to question the affidavits.[3] On December 23, 1952, plaintiff UE moved the Board for a hearing in respect to the Order and, pending such hearing and a determination made on the basis thereof, for the withdrawal of the Order. On December 25th, the Board denied this motion (J. A. 12).

(d) The Proceedings Below

Immediately upon the denial of UE's motion for a hearing, respondents brought the instant actions on December 31, 1952 for a declaratory judgment that the Board's Order was illegal on the grounds that the Board could not establish conditions for compliance other than and in addition to those provided by the Act; that the demand for additional and different affidavits as a condition of continued compliance was beyond the statutory power of the Board; that the Board had no power to inquire into the truth of the affidavits; that the Board was not justified in proceeding upon the basis of the presentment; and that the Board's action in promulgating a self-executing order of decompliance without notice and hearing was a denial of due process.[4] Respondents also asked for an injunction restraining the Board from proceeding with enforcement of its Order. The Board moved to dismiss on the ground that

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[3] "Mr. Findling. * * * I don't mean to say or imply that in proceeding here the Board is relying or proceeding on information to cast doubt upon the compliance status of the plaintiffs that has come from any source except through the Judge of the Southern District of New York, who forwarded to us the presentment in question" (Hearing minutes, SM p. 42).

[4] With respect to the due process questions raised by respondents, counsel for the Board stated for the first time in a supplemental memorandum in support of its motion to dismiss filed several days after argument that it would not "revoke the unions' compliance status on the basis of answers or failure to answer, without first giving plaintiffs an opportunity to be heard" (J. A. 160). However, the Board's order has neither been rescinded nor amended and in fact the Board during the very pendency of the proceedings before the district court acted to deny crucial benefits to which respondents were entitled (J. A. 162-166). See also the opinion below (J. A. 154).

the District Court lacked jurisdiction and on the further ground that the respondents stated no claims warranting relief.

The actions were consolidated for hearing and by stipulation there was submitted for the court's decision the motion of each respondent for permanent injunction (J. A. 48). On January 27, 1953 the District Court issued an opinion holding that the Board exceeded its statutory authority in promulgating the Order (J. A. 48-52; 110 F. Supp. 220).

On appeal the court below agreed with the District Court's position that the Board's function with respect to the affidavits was "administrative only" and that neither the Act nor its legislative history showed any Congressional intent to permit the Board to impinge upon the function of the Department of Justice to inquire into the truth or falsity of the affidavits (J. A. 152-153).

The court below also held that the District Court had jurisdiction over the subject matter (J. A. 153). In so holding the court expressed the view that a district court in the exercise of its equity power may restrain Board action plainly beyond the scope of statutory authority where immediate and irreparable injury has been shown. The court found such a showing and accordingly affirmed the decision of the District Court (J. A. 154).

Reasons for Denying the Writ

1. Petitioner has not shown special or important reasons for granting the writ within the meaning of Rule 38 of the Rules of this Court.

Two lower courts have held, after careful consideration, that the petitioner has no power to deprive the respondent unions of their compliance status where these unions have met all the statutory requirements of Section 9(h) of the

Act by duly filing non-Communist affidavits. The clear statutory language, the legislative history, as well as the prior interpretations of petitioner itself, overwhelmingly compelled the conclusion of the two lower courts that the function of the Board with respect to these affidavits is exclusively administrative and that the Board has no statutory power to inquire into their truth or falsity. As Judge Bazelon held for the Court of Appeals:

> "We hold, for the reasons expressed in the trial court's memorandum, that the Board has no authority under the Act to deprive the Unions of their compliance status under § 9(h). The scheme of § 9(h) is clear. It imposes a criminal penalty for filing a false affidavit under § 9(h), in order to deter Communist officers from filing at all; then the failure of such an officer to file is made the touchstone for barring his union from crucial benefits under the Act, as an incentive to the membership to rid itself of such leadership. There is nothing in the Act or in its legislative history or in good sense to indicate that Congress meant to go further and impose the drastic penalty of excluding the union from the Act's benefits because its officer had deceived the union as well as the Board by filing a false affidavit. We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit. The Board makes no claim of such awareness here. To impose this penalty upon the great mass of innocent union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets" (J. A. 153).

Petitioner does not really urge that the law is otherwise. Petitioner is unhappy with the present state of the law. Petitioner seeks in effect a declaration from this Court which will assist Congress to "determine whether additional legislation is necessary * * *" (Petition, p. 11). It seeks legislative aid from this Court. This Court has traditionally refrained from interference in the political processes of legislation. If the petitioner is dissatisfied with the present law the proper forum is elsewhere. This Court should deny the petition for writ of certiorari.

2. The holdings of the two lower courts were clearly compelled by the plain language of the statute, its legislative history and the prior repeated interpretation of petitioner itself, and require no review by this Court.

a. The Plain Language

The plain language of the statute provides that the only requisite for compliance with Section 9(h) of the Act is that there be "on file" with the Board an affidavit executed by each officer of the union that he is not a member of the Communist Party or affiliated with such party. The Department of Justice is given the sole responsibility to investigate or prosecute for false filing. The statute reads *inter alia*:

> "(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, [no petition under section 9 (e) (1) shall be entertained], and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." [5]

b. The Legislative History

The legislative history shows beyond any doubt that Congress intended to limit the Board solely to administrative functions in respect to the affidavits.

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[5] Unless otherwise stated all italics are supplied throughout.

In enacting the Taft-Hartley Act, Congress was not unmindful that false affidavits might be filed and gave full consideration to the methods of ascertaining the truthfulness of such affidavits and the sanctions to be applied where such affidavits were found to be false.

As originally passed by the House of Representatives, HR 3020 provided that no labor organization be certified if an officer thereof is or was or could reasonably be regarded as, a member of the Communist Party, or believed in the overthrow of the government by force or by illegal methods.[6] The Senate passed a similar bill differing with the House bill in that certificates would be denied on a showing of *present* membership.[7] The supporters of the

[6] "9(f)(6). No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d) is or ever has been a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is or ever has been a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods" (H.R. 3020, 80th Cong., 1st Sess., 1 *Legislative History*, at 190).

[7] The bill as it passed the Senate after an amendment authorized by Senator McClellan, was substantially similar:

> "(h) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization tion designated on the ballot taken under subsection (c), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." 1 *Legislative History*, at 251.

Senate bill clearly believed that they had given the Board the authority to inquire into the truthfulness of the affidavits.[8] The Conference Committee decisively rewrote the legislative plan so as to expunge from section 9(h) all provisions for Board inquiry in this area and provided instead the plan and the language finally enacted into law. Senator Taft while presenting the Conference Report to the Senate explained the rationale for denying the Board the power to investigate the character of all union officers in terms of the indefinite delay of representation proceedings which would inevitably occur.[9] In debate on this provision he

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[8] "Mr. Ferguson: How would such a matter (Communist leadership of a Union) be brought before the Board? What would be the procedure to bring the question before the Board? I find nothing in the amendment respecting how the question should be brought before the Board.

Mr. McClellan: *I think the Board could inquire into the matter upon its own volition.* I do not think it would be necessary for the Board to inquire into the case of every officer, of course, but it would be like barring a Communist from working for the Government; when it was discovered that an individual was a Communist, of course he could be discharged. * * *" *Congressional Record*, Senate, May 9, 1947, p. 5095; 2 *Legislative History*, 1435.

[9] "Subsection 9(h) of the conference agreement embodies the principle of an amendment adopted when the bill was being considered on the floor of the Senate which would have prevented a labor organization from being eligible for certification if any of its local, national, or international officers were members or affiliates of the Communist Party or believed in or supported organizations advocating the overthrow of the United States Government by force or any other illegal or unconstitutional methods. There was a similar provision in the House bill, although the language was somewhat different. In reconciling the two provisions the conference took into account the fact representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation. The conference agreement provides that no certification shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers and officers of its national or international body, to the effect that they are not members or affiliates of the Communist Party or any other proscribed organization. The penal provisions of section 35A of the Criminal Code (U. S. C., Title 18, sec. 80) are made applicable to the execution of such affidavits."

repeated this reason,[10] and on still another occasion he clearly expressed his view that the mere filing of "an affidavit is sufficient for the Board's purpose * * *."[11]

c. The Prior Repeated Interpretations of the Petitioner Itself.

The Board itself has until this proceeding consistently taken the view that the provisions of the Act bar it from inquiry as to the truth of the affidavits filed with it. The Board's Rules and Regulations state that compliance with Section 9(h) of the Act means filing of the affidavit and

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Congressional Record, Senate, June 5, 1947, p. 6602; 2 *Legislative History*, 1542.

[10] "The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill." *Congressional Record*, Senate, June 5, 1947, p. 6604; 2 *Legislative History*, 1547.

[11] "Section 9(h): This provision making the filing of affidavit with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification preceedings could have been infinitely delayed while it investigated and determined Communist Party affiliation. Under the amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required." *Congressional Record*, Senate, June 12, 1947, p. 7002; 2 *Legislative History*, 1625. See also Senator Ball's remarks, 93 Cong. Rec. A3232, 2 *Legislative History*, 1627.

nothing more.[12] The Board has handed down many decisions asserting it lacked statutory power to investigate behind the affidavits.[13]

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[12] "(b) For the purpose of these Rules and Regulations, *compliance with section 9(h) of the act means in the case of a national or international labor organization, that it has filed* with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization *has filed* with the regional director in the region in which the proceeding is pending:

* * * * * *

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." Rules and Regulations, Subpart B, Section 102.13(b) and (b)(2).

[13] Illustrative is its opinion in *Matter of Sunbeam Corporation*, 93 NLRB 1205 where the Board dealt with an employer's refusal to bargain with a certified representative of its employees:

> "Respondent's interpretation of the Act runs counter to the plain intent of Congress. When the amendments to the National Labor Relations Act were being considered, Congress showed abundant concern for the problem of communism in labor organizations. It chose to meet this problem, not by writing qualifications into the substantive or definitional portions of the Act, but by enacting the procedural requirements of Section 9(h). The question whether some persons filing the non-Communist affidavits required by that section have committed perjury was clearly intended by Congress to be the concern of the Department of Justice. Were the Board to take upon itself the task of deciding the truth or falsity of non-Communist affidavits, it would be departing from the legislative plan."

See also *Alpert* v. *Alpert*, 92 NLRB 806 (950).

> "We have heretofore refused to go behind the affidavits filed under the provisions of Section 9(h), stating that neither the statute itself nor its legislative history authorize the Board to 'investigate the authenticity or truth of the affidavits which have been filed.'"

See to the same effect *Matter of American Seating Company*, 85 NLRB 269 (1949); *Matter of Craddock-Terry Shoe Corp.*, 76 NLRB 842; *Matter of Sunbeam Corporation*, 89 NLRB 469.

In testimony before Congress, the Board has consistently asserted that the Act grants the Board no power whatever to inquire into the falsity of the 9(h) affidavits. Thus, on March 18, 1952, the then Board Chairman Herzog, the original defendant herein, stated to the Senate Subcommittee on Labor and Public Welfare:

> "The Labor-Management Relations Act provides in essence, by section 9(h), that the facilities of the NLRB shall only be available to labor organizations whose officers have filed certain non-Communist affidavits. Whatever the difficulties of this arrangement, it at least has spared the Board the intolerable and delaying administrative burden which would have been imposed under an earlier legislative proposal that of having the Board itself determine, as part of every representation proceeding where the issue was raised, whether or not a particular labor organization had Communists among its officers. Had this provision been enacted into law, the Board would have been inundated with litigation on an issue concerning which proof is singularly difficult to obtain, to the detriment of speedy disposal of cases which cry out for early employee recourse to the ballot box.
>
> "Instead, Congress imposed an obligation on labor union 'officers'—with defining them in the statute—to take the affirmative step of foreswearing Communist affiliation. The theory evidently was that if these officers' refusal to sign affidavits deprived their constituents of all the Board's facilities, the spotlighting of that refusal would soon generate pressure from below to remove them from office. It was apparent from the outset that the NLRB's *sole* function was to make certain that the necessary persons filed these affidavits, and that, once they had done so pursuant to the rules we adopted, *we were to process their cases without inquiring into the truth or falsity of the affidavits themselves. Where such an issue arose, the Board's statutory duty was only to refer the affidavit to the Department of Justice for investigation and possible prosecution for perjury under the Criminal Code.* We have made 55 such referrals since 1947." Hearings before Senate Subcommittee of the Committee on Labor and

Public Welfare, Communist Domination of Unions and National Security, p. 91.[14]

The annual reports of the Board reflect the same position. In its Fourteenth Annual Report for the fiscal year ending on June 30, 1949, the Board stated:

"The Board has consistently held that it will not investigate the authenticity of truth of affidavits filed

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[14] The Board opposed any modification of its power in regard to affidavits. Mr. Herzog told the same Sub-Committee that:

"We doubt, however, whether it would be advisable to modify the Board's existing affirmative authority by conferring upon it, as suggested by some, the power and responsibility of determining whether a particular labor organization is in fact 'Communist-dominated.' As noted at the outset of this statement, *Congress wisely spared the N.L.R.B. that task in 1947, although it had been imposed in earlier versions* of that year's legislation. We believe that it would be a mistake to change that approach today. There are two principal reasons: First, if this Board is expert in anything, it is in the area of collective bargaining. The field of subversive activities, where proof is notoriously difficult to obtain, *calls for a different sort of expertise* and for special investigative techniques, not only unfamiliar to our staff but inconsistent with the open-court procedures of a quasi-judicial agency." *Hearing before Senate Subcommittee, supra,* at p. 94.

Mr. Herzog emphasized this position in the following colloquy (*Hearings* at pp. 104-105):

"Senator Humphrey. Let us just stop there for a moment. Let us assume that the Board has reason to believe that an affidavit is not based upon fact, but is, as we put it, 'fishy'.

"Mr. Herzog. Yes.

"Senator Humphrey. Then you refer that to the Department of Justice; is that right?

"Mr. Herzog. Yes.

"Senator Humphrey. During that interim period that the Department of Justice is examining the affidavit and seeking information the evidence pertaining to its validity, does the Board extend to the union whose officers have filed the affidavit the privileges and the rights under the National Labor Relations Act?

"Mr. Herzog. We certainly do, on the assumption that we assume still applies in America: that they are innocent until proven guilty."

> under Section 9(h), as such investigations are by the statute made a function of the Department of Justice."

And in its Sixteenth Annual Report, filed in Congress two weeks after the service of the Order of December 19, 1952, upon respondents, the Board at page 48 thereof reaffirmed its lack of power to look behind the affidavit:

> "The Board, also during the 1951 fiscal year, had occasion to reaffirm its prior ruling that it would not attempt to investigate the truth or falsity of non-Communist affidavits because the statute itself rests this function and responsibility solely in the Department of Justice."

3. The petitioner cannot avoid the import of the clear statutory language and legislative intent under the guise of "implied power."

The Board is compelled by the language and legislative history of the Act to place its main reliance upon a claim of "implied power" (petition, p. 12) as justification for its lawless exercise of a power it does not possess. But this case does not involve the Board's exercise of functions concededly within its sphere of discretion, such as the defining of a bargaining unit or the issuance of an unfair labor practice complaint. This case involves the right of access to the Board. The specific conditions for such access have been set by Congress in the Act. The Board has been granted no power whatever to impose other conditions as to who shall or shall not have access to it as a complying party.

It is true that in those areas within the Board's sphere of discretion the Board may invoke "implied powers". *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9.[15]

[15] It is to be noted that such authorized functions are *quasi*-judicial and fact finding in nature. Compliance involves a purely ministerial or *pro forma* action on the part of the Board. See also *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219; *NLRB* v. *Weisman Co.*, 170 F. 2d 932, cert. denied 336 U. S. 972.

But since this case involves an attempted exercise by the Board of a power denied to it by Congress, and not the manner of exercise of an authorized power, reliance upon "implied power" is totally misplaced.

The fallacious nature of the Board's claim of "implied power" is sharply illustrated by the fact that in the attempted exercise of this power it would establish criteria for compliance which were either rejected by Congress or are unconstitutional.

1. The Order, following the void presentment, would cancel compliance if there is "reasonable doubt as to the truth and validity" of the affidavits. Congress rejected this criterion in rejecting H.R. 3020 which would have denied access to Board processes to a union any of whose officers "could reasonably be regarded" by the Board as a member of a proscribed organization.

2. The Board again following the void presentment, would per se create such reasonable doubt from the assertion of the privilege against self-incrimination. No such inference may constitutionally be drawn. *Twining* v. *N. J.*, 211 U. S. 78.

3. Although Congress deliberately required only that an averment as to present membership be made in the affidavit as a condition of compliance the last two questions on each questionnaire require an oath as to past membership or affiliation as a condition of current compliance. Even as adopted, the statutory affidavit was open to grave constitutional doubt. *ACA* v. *Douds*, 339 U. S. 382. The Order in going beyond the statutory requirements, oversteps the constitutional limits and creates a bill of attainder. *Weiman* v. *Updegraff*, 344 U. S. 183; *Cummings* v. *Missouri*, 4 Wall 277; *U. S.* v. *Lovett*, 328 U. S. 303.[16]

[16] The Board's unlawful actions further violate the public policy reflected from time immemorial in statutes of limitations. Affidavits are effective to maintain compliance only for one year. Prior affidavits are *functus officio* as far as the Board is concerned, although,

The comparison between the standards of the Order and the provisions of the Act demonstrates the invalidity of the Board's newly found theory of "inherent" power. Its assertion of such power has inevitably led to a conflict between its Order and the Act. The assertion of a power denied by Congress and the consequent establishment of new standards as the inevitable result of such assertion are both invalid.

4. The court has jurisdiction over the action and must grant equitable relief upon a finding of real, immediate and irreparable injury resulting from action of Board not authorized or permitted by statute.

The courts below found that the Board had acted beyond its statutory power, that the injury resulting therefrom was immediate and irreparable and that the issuance of an injunction was essential to preserve to the respondent unions crucial statutory benefits. Referring to the self-executing order [17] of the Board decomplying respondent unions forthwith without hearing unless they complied with the illegal demand of the agency, the Court stated:

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if false, they subject the maker to prosecution within the three-year statute of limitations. The Board has no right to require reaffirmation of an affidavit made in 1949 as a condition of compliance in 1953. If the Board could do so, it could effectively nullify the statute of limitations and forever expose the affiants to the danger of being called upon to meet ancient and stale charges when facts are obscure, memories dulled, and witnesses unavailable. The general objects of policy and morals inherent in the ancient doctrine of these statutes of repose would be violated by this action. *Shepherd* v. *Thompson*, 122 U. S. 231, 30 L. ed. 1156 at 1157.

[17] That the case was ripe for adjudication see the opinion of the court below wherein it stated:

> "In these circumstances, it can hardly be said that the action assailed is not ripe for review, or that the Unions should be required to exhaust a dubious opportunity for hearing offered to them after the ax had fallen, or that there is an adequate remedy at law for the injuries resulting from the Board's unlawful action."

> "We have already expressed our view that the Board action assailed here is unlawful. That the injury resulting therefrom is 'real, immediate, and incalculable' is evident from the instructions issued by the Board's general counsel to its regional directors throughout the country, as described in the uncontradicted allegations of the affidavit filed on behalf of the Unions. These instructions have deprived and, but for the injunction issued below, would have continued to deprive the Unions of crucial benefits under the Act and this without any sort of prior hearing."

When an administrative agency (J. A. 154) acts beyond its statutory authority, in an area where it has no power to act, the district court has jurisdiction to grant equitable relief in the face of such unlawful actions. The exercise of equity jurisdiction by the district court upon such findings is entirely appropriate. *Stark* v. *Wickard*, 321 U. S. 288; *Social Security Board* v. *Nierotko*, 327 U. S. 358.[18] Petitioner's claim of immunity from such jurisdiction is without foundation.[19]

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[18] "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction * * *. Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative action." *Stark* v. *Wickard*, 321 U. S. 288, 309.

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"Administrative determinations must have a basis in law and must be within the granted authority. * * * An agency may not finally decide the limits of its statutory power. This is a judicial function." *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369.

[19] That this claimed immunity from the equity jurisdiction of the district court is, to say the least, unusual, is demonstrated by the fact that the Social Security Board (*Social Security* v. *Nierotko*, 327

Petitioner's reference to cases such as *Inland Empire District Council* v. *Millis*, 325 U. S. 697 and *American Federation of Labor* v. *NLRB*, 308 U. S. 401 is an effort to assimilate this case to a certification proceeding, where judicial review has been strictly limited by this Court. But this is not a certification proceeding, nor did the reasons for limitations on judicial review in such cases have the slightest applicability here. Cf. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300.[20]

Nor is the Board's present order "preliminary" to either a representation or an unfair labor practice proceeding in the sense that it is part of such a proceeding. On the contrary, if the Board's order were to be carried into effect, respondents would, so far as the Act is concerned be declared outlaws. If respondents have no remedy in the District Court they will have no remedy at all.

The Board's action here is completely without statutory authorization and as such is subject to judicial review where irreparable injury is shown.

U. S. 358); the Secretary of Agriculture (*Stark* v. *Wickard*, 321 U. S. 288); *Publicker Industries* v. *Anderson*, 68 Fed. Supp. 532); the Office of Price Administration (*Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259); the Maritime Commission (*Land* v. *Dollar*, 330 U. S. 731); the National Recovery Administration (*Johnson* v. *United States*, 175 F. 2d 612); the Post Office Department (*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94); the Federal Radio Commission (*Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266); The Federal Communications Commission (*F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134); the Wage and Hour Administration (*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607); the Interstate Commerce Commission (*Yonkers* v. *United States*, 320 U. S. 685); and the Secretary of the Interior (*Red Canon Sheep Co.* v. *Ickes*, 69 App. D. C. 27, 98 F. 2d 308; *Ickes* v. *Fox*, 300 U. S. 82), have no such immunity.

[20] The petitioner states that the jurisdictional principle followed by the Federal Courts is that "unless the Board action raises a substantial constitutional question, review thereof may not be obtained in a federal district court, even though it is alleged that the Board has acted unlawfully *or beyond its statutory authority*" (Petition, p. 19; emphasis in original). But the Court of Appeals, in *Madden* v.

CONCLUSION

For the foregoing reasons it is respectfully submitted that petitioner has presented no question requiring a determination by this Court and that therefore the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia be denied.

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March, 1954

Brotherhood, 147 F. 2d 439, 442, cited at p. 19 of the petition, stated that "the case is not one where the action of the Board is without constitutional or statutory authority". The other cases cited at pp. 18-20 of the petition are either certification cases or cases involving an attack on the discretionary power of the Board or its general counsel to issue a complaint and are not relevant to this proceeding.

Even if the petitioner is right in limiting judicial review only to those cases in which constitutional issues are raised, such questions are raised here. Any government agency which seeks to exercise power in excess to that granted by statute acts in violation of due process. Moreover, the Board's order here, had it been permitted to become effective, would have deprived respondents of valuable rights without any notice or hearing whatsoever. Such action is clearly unconstitutional. *In re Carter*, 177 F. 2d 75. Cf. *Foy* v. *Douds*, 172 F. 2d 720.